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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1974

No. 74-1184

AMERICAN TRADING TRANSPORTATION COMPANY, INC.
(Formerly AMERICAN TRADING AND PRODUCTION CORPORATION) and JOSEPH V. FINN, *Petitioners,*

vs.

ARNOLD ESCOBAR, *Respondent.*

SUPPLEMENTAL BRIEF OF PETITIONERS UNDER SUPREME COURT RULE 24 ¶ 5 IN SUPPORT OF PETITION FOR CERTIORARI

GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
Two Embarcadero Plaza,
Suite 2600,
San Francisco, California 94111,
Counsel for Petitioners.

LILLICK MCHOSE & CHARLES,
GARY P. SNYDER,
Two Embarcadero Plaza,
Suite 2600,
San Francisco, California 94111,
Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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CASES

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Matise v. American Foreign S.S. Co., 488 F.2d 469, 1974 A.M.C. 1419 (9th Cir. 1974).

RULES

Supreme Court Rules 23 ¶ 1 (c) and 24 ¶ 5.

DISCUSSION

This supplemental brief is filed under Supreme Court Rule 24 ¶ 5.

Counsel for petitioners herein have learned, just after the actual filing of the Petition herein Wednesday, March 19, 1975, that the Court on Monday, March 17, 1975, granted certiorari in the matter of *American Foreign Steamship Co., a corporation, Petitioner, v. Lilliam M. Matise, as personal representative of Granville C. Matise, deceased, Respondent,* Supreme Court, October 1974 Term, No. 74-966. The granting of certiorari in *Matise* is significant in relation to this case.

The purpose of this Supplemental Brief is to show the relationship of the two cases.

The *Matise* case and this case present identical questions, although this case presents additional questions.

A review of the Petition for Certiorari filed in the *Matise* case shows that the questions presented by this Petition are to a large degree the same as questions 2 and 3 of the Petition in the *Escobar* case.

The chronology of the developments of *Matise* and *Escobar* in the Court of Appeals for the Ninth Circuit is important. The *Matise* case was argued first, and the *Escobar* case was then argued without knowledge of anyone involved that the *Matise* case had been decided, because the *Matise* opinion had not yet been released.

The *Matise* opinion was printed and released and then the *Escobar* panel decided the *Escobar* case on the basis of the *Matise* opinion. Contained within the *Escobar* opinion was footnote No. 3, 503 F.2d at 274, 1974 A.M.C. at 1430, stating in part that equity (discretion) was not to be used in measuring penalties. This issue was not briefed and was not argued to the Ninth Circuit in the *Escobar* case and was not even before the Court of Appeals.

When the *Matise* matter was remanded then to the District Court, the *Matise* judge there considered himself bound by footnote No. 3 in *Escobar* and rendered judgment accordingly.

Therefore the *Escobar* case has been decided on the precedent of *Matise,* and the *Matise* case has been subsequently decided on the precedent of a footnote in the *Escobar* case. The two cases are so intertwined that it must be manifest that with certiorari granted on the one it should be granted in the other.

Respectfully submitted,

GRAYDON S. STARING,

FREDERICK W. WENTKER, JR.,

Counsel for Petitioners.

LELLICK MCHOSE & CHARLES,

GARY P. SNYDER,

Of Counsel.

March 25, 1975.